U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 October 2004

BALCA Case No.: 2003-INA-292
ETA Case No.: P2002-MA-01327773

In the Matter of:

KELLY & COMPANY, INC.,
Employer,

on behalf of

MARILENE MACHEDO,
Alien.

Appearance: Ben Tahriri, Esquire
Newton, Massachusetts
For the Employer and the Alien

Certifying Officer: Raimundo Lopez
Boston, Massachusetts

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 25, 2001, the Employer filed an application for labor certification to enable the Alien to fill the position of Video Operator. (AF 1-4). No job requirements were listed and the rate of pay was $15.00 per hour. (AF 1).

On April 21, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification pursuant to 20 C.F.R. §§ 656.20(g)(1) and 656.21(b)(6). The CO noted that the file lacked evidence of an internal job posting. (AF 54). In addition, the CO noted that eleven U.S. applicants applied for the job, but the Employer did not interview or contact any of them. Accordingly, the Employer was advised to document lawful, job-related reasons for its rejection of each U.S. worker at the initial time of referral. In particular, the CO identified four U.S. workers who appeared to have similar experience and knowledge in the duties and responsibilities listed on the ETA 750A, item 13. (AF 56).

On May 24, 2003, the Employer submitted his rebuttal and claimed that he had received ineffective assistance of counsel when the ETA 750 was filed. The Employer claimed that both the company description and job description were incorrect. (AF 57). The Employer stated that the company is a small, in-home video and movie production business. (AF 58). The Employer averred that in addition to the video production and editing duties, the job description should have listed that the applicant was required to physically assist the owner, Mr. Kelly (who is disabled), and possess a valid driver's license. The Employer included a copy of the handwritten note describing the desired position that he had provided to his attorney before the application was submitted. (AF 62-66). This note includes numbers that appear to correspond to the respective boxes on the ETA 750. Despite the fact that the note discusses some of the technical requirements in item 15, this information was not included in item 15 on the ETA 750. (AF 1, 63). However, the note does not list any required experience in item 14. Instead, the Employer wrote, "[w]hat does Marilene have?" (AF 63). Also included with the rebuttal was an entry of appearance from the Employer's new counsel. (AF 67).

The Employer cited 20 C.F.R. § 656.20(g)(1)(ii)(2), which waives the posting requirement for businesses in private homes that do not employ more than one U.S. worker. (AF 58). The Employer stated that he did not offer Applicant #1 the job because he was overqualified and his management experience "was not conducive to my needs for someone who could work with me at home or in a solo atmosphere." The Employer claims to have contacted Applicant #2, but he advised the Employer that he was no longer interested or available. (AF 58-59). The Employer stated that the main reason Applicant #3 was not offered the job was that he lived eighty miles away. In addition, the Employer determined that this applicant was not qualified because his work experience was mainly in processing and mixing music. The Employer acknowledged that no experience was necessary for the job, but claimed that "sometimes having a different kind of experience can be a negative quality since it might hamper the person's ability to learn a new method of operation." (AF 59). The Employer determined that Applicant #4 would be unable to pack, transport and set up the camera equipment because he was 40% disabled. Further, the Employer claimed that this applicant's "extensive experience would have actually been a hindrance to his performance as I was looking for an inexperienced candidate to train." The Employer did not meet with this applicant. The Employer also did not address the seven other workers referred to him.

On June 27, 2003, a Final Determination ("FD") was issued in which the CO denied certification. The CO denied certification because the Employer did not make a good faith effort to interview the U.S. workers. Further, the CO noted that the Employer was willing to accept the Alien's lack of experience but unwilling to accept U.S. workers who have experience in video production or inexperienced U.S. workers. The CO concluded that the Employer "cannot summarily disqualify potential candidates by indicating that they are either overqualified or not suited to a one-employee environment." (AF 69). On July 31, 2003, the Employer requested review of the denial and the matter was docketed by the Board on September 23, 2003. (AF 70).

DISCUSSION

Certification is properly denied where an employer unlawfully rejects workers who meet the stated minimum requirements. *ABC Home Video Corp.*, 1993-INA-480 (Nov. 16 1994). An employer may not reject a U.S. worker solely because he or she is overqualified. *World Bazaar*, 1988-INA-54 (June 14, 1989)(*en banc*); *IPF Int'l, Inc.*, 1994-INA-586 (Jul. 24, 1996).

Even though the advertisement did not list all the qualifications that the Employer had requested, the Employer treated the applicants as if they had responded to the advertisement that he submitted to his attorney. Indeed, the Employer states "it never occurred to me that the applicants were responding to an incorrect advertisement." (AF 71). The Employer did not contact the applicants to inquire whether they had a valid driver's license or the ability to help him pack and load the equipment. Instead, the Employer reviewed their resumes and determined that the applicants were overqualified or their experience was irrelevant. The Employer agrees that no experience was necessary for the position. (AF 59). Therefore, irrelevant experience or being overqualified is an insufficient basis on which to support the Employer's rejection of these workers.

The Employer did not contact the workers in question and has not documented that they were unwilling or unavailable to perform the job. The Employer has failed to establish manifest injustice resulting from his attorney's omission. His belated offer to amend the ETA 750A and readvertise would not cure the deficiencies in his recruitment effort. *Discpak*, 2002-INA-303 (Jan. 22, 2004). He has failed to prove that there were not suitable U.S. workers available to fill the job, as he did not ever contact many of the applicants to further inquire as to their qualifications. As such, the CO properly denied certification.

ORDER

The CO's Final Determination denying labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.